

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MCM GROUP 22 LLC,	:
	:
Plaintiff,	:
	:
-against-	:
	:
LYNDON PERRY,	:
	:
Defendant.	:
	:
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Case No.: 22-cv-06157-JHR

**NOTICE OF SUPPLEMENTAL AUTHORITY IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendant Lyndon Perry respectfully provides the Court with notice of supplemental authority, *Sonya Larson v. Dawn Perry*, Case No. 1:19-cv-10203-IT, 2023 U.S. Dist. LEXIS 163833 (D. Mass Sept. 14, 2023), attached as **Exhibit A**. The decision in *Larson* bears on Defendant's fair use defense as set forth in Defendant's Motion to Dismiss (Doc. No. 28).

In *Larson*, Dawn Perry wrote a letter about donating her kidney. *Id.* at *1. After reading the letter, Sonya Larson was inspired to write a book about a kidney recipient who was unhappy about receiving a letter from her living donor. *Id.* In the book, Larson used the letter, and Perry alleged this was copyright infringement. *Id.*

While the letter was used in the book, the use was in a critical manner. The court held that the use of the letter was fair use, taking into account the recent Supreme Court case *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023). *Id.* at *20-30. First, under the character of use factor, the court noted the importance of context when discussing criticism because there is an "unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions [which] removes such uses from the very notion of a

potential licensing market.” *Id.* at *23-24 (citation omitted). Second, in discussing the effect on market value, the court noted the issue is whether the work was transformative such “that demand for the new work can exist alongside demand for the original.” *Id.* at *28. “[J]ust as a new parodic use may well suppress demand for the original by its critical effect without usurping demand by its substitutive effect, a critical use may serve a similar role.” *Id.* (cleaned up).

The evaluation of the fair use factors in *Larson*, applying *Warhol*, support Defendant’s fair use defense here. Here, as argued, Defendant used an image of Ms. Khater discussing her career plans in his post criticizing Celsius’s business practices, including hiring Ms. Khater. It is unlikely a license would issue for this use. Moreover, the image, a still frame from a video, was transformative such that demand for this new work can exist alongside the original. Furthermore, Defendant’s use would not harm demand for the original work.¹ Thus, as in *Larson*, Mr. Perry’s use of the image is fair use.

Dated: September 19, 2023.

Respectfully Submitted,

/s/ Jay M. Wolman

Jay M. Wolman (JW0600)
RANDAZZA LEGAL GROUP, PLLC
100 Pearl Street, 14th Floor
Hartford, CT 06103
Tel: 978-801-1776
Email: ecf@randazza.com

Marc Randazza, (*Pro Hac Vice*)
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
Tel: 978-801-1776
Email: ecf@randazza.com

*Attorneys for Defendant,
Lyndon Perry*

¹ That Plaintiff, a subsequent alleged holder of the copyright, might not want there to be any demand for the original is not part of the analysis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 19, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jay M. Wolman

Jay M. Wolman